IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NATIONAL BANK OF COMMERCE, of Seattle, a creditor. Appellant, vs. R. E. DOWNIE, Trustee, et. al. Appellees.	No. 1527.
THE SEATTLE NATIONAL BANK, a creditor, Appellant, vs. R. E. DOWNIE, Trustee, et. al. Appellees.	No. 1528.
THE SEATTLE NATIONAL BANK, Petitioner. vs. R. E. DOWNIE, Trustee, et. al. Respondents.	No. 1529.
THE NATIONAL BANK OF COMMERCE, of Seattle, Petitioner, vs. R. E. DOWNIE, Trustee, et. al. Respondents.	No. 1532.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellees

PETERS & POWELL,
546-549 New York Block, Seattle, Wash.

COOLEY & HORAN,
Wisconsin Building, Everett, Wash.

KERR & McCORD,
Mutual Life Building, Seattle, Wash.

The Ivy Press, Second and Cherry, Seattle

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The statement of the case as set forth in appellant's brief is sufficiently comprehensive to give the court the necessary knowledge of the facts in this case, and therefore we will add nothing to it.

ARGUMENT

The appellants are correct in their statement that we rely entirely upon the provisions of section 3477 Rev. St. of the United States, which for convenience of reference, we will quote at length:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer at the time of the acknowledgment, read and fully explained the transfer, as-

signment, or warrant of attorney to the person acknowledging the same."

Act of July 29th, 1846; Act of February 26, 1853.

That Congress has the right to legislate in the manner in which it has done in this section cannot be doubted, nor is that right questioned by the appellants. The government has the undoubted right, through Congress, to entirely control the disposition and enforcement of all claims against the government, and that Congress intended by its enactment to absolutely nullify all assignments of claims against the government seems, from the language of the act, so plain as to require no argument. That the assignments which are the basis of this controversy conflict directly with the plain provisions of this statute, can readily be seen by a comparison of the stipulation of facts as set forth in the appellants' brief, with the statute. It will be noted that this statute declares that all assignments of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, are absolutely null and void, but provides the manner in which these assignments may be made by compliance with the formalities specified there-

in, after the allowance of such claims and the ascertainment of the amount due and the issuing of a warrant for the payment thereof. It will be noted by the statement of facts, as set forth in the appellants' brief, that the assignments in controversy here are:

First: Of claims against the United States.

Second: That they are absolute assignments.

Third: That they were made before the allowance of such claims or the ascertainment of the amount due or the issuing of a warrant for the payment thereof.

The stipulation further shows that these assignments do not even comply with the formalities expressly required by the statute, where an assignment is made after the allowance of a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. These assignments are declared by the plain terms of this statute to be absolutely null and void, not voidable, nor void as against the government of the United States, but void for any and all purposes whatsoever.

The Supreme Court of the United States has had occasion to pass upon this statute many times since its enactment, and we submit that an examination of these cases will disclose, that from its first

to its latest utterance upon the subject, it has held assignments of the character appearing in this case to be absolutely void.

This section was construed by the Supreme Court of the United States in the case of United States vs. Gillis 95 U. S. 407 (decided December 10th 1877). This was a claim by John H. Ryan against the Federal Government for property taken by the military officers of the United States in March, 1865. Ryan transferred his claim against the United States for the proceeds of the cotton thus taken to the plaintiff's intestate, Thos. H. Gillis, and assented to the bringing of this action thereon in the name of said Gillis, and judgment was given in the Court of Claims in favor of Gillis, as assignee, and against the United States Government, and from which decision the government appealed.

The court here holds that in the absence of a statute, a claim against the United States Government could not be transferred and with respect to these statutes it says:

"So far are they from giving any potency to assignments and transfers of rights in action, so far from changing the common law rule, that such rights in action are not assignable, the statute strikes down

and denies any effect to powers of attorney, orders, transfers and assignments, which before were good in equity, and which a debtor was bound to regard when brought to his notice."

"We discover nothing in reason, nothing in the mischief the act was plainly intended to remedy, and nothing in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made; nothing that can justify our holding that, when Congress said, all transfers and assignments, partial or entire, absolute or conditional, of claims against the United States, shall be null and void, they meant they should be in operation only when presented to the accounting officers of the treasury, but effective when presented everywhere else. Such was not the construction given to the act by the Supreme Court of Minnesota in the case of Becker vs. Sweetzer, 15 Minn. 427, where the validity of an assignment of such a claim came in question. And we are not informed that any court held such to be the meaning of the act, until the Court of Claims in 1872 adopted it."

The Supreme Court overrules the Court of Claims on this question and holds that this section is of universal application and covers all claims against

the United States in every tribunal in which they may be asserted.

Justices Bradley and Field dissented from the opinion insofar as it held that an assignment of a claim against the United States could not transfer the legal title thereto without the aid of a statute, but agreed in the majority opinion of the court declaring that the statute of 1853 prohibited such assignment.

In the case of Spofford vs. Kirk 97 U. S. 484 (decided November 11, 1878), the facts were as follows:

Kirk had a claim against the United States for supplies furnished to the army during the Rebellion and drew two orders upon the parties who were representing him in the prosecution of his claim, which orders were accepted by said parties. Afterwards these orders were transferred to Spofford, who became the assignee and holder of both of them for value and in entire good faith. Upon the issuance of the treasury warrant, Kirk, the assignor, refused to endorse the warrant and Spofford filed his bill to compel, by specific performance, the assignment and delivery to him of the treasury warrant. The claim made by Spofford was, that these assignments created in equity an absolute and irrevocable appropriation of their contents, and that when collected, the

sums named in the orders were held by the drawees in trust for the payees, or their assignees, and the Supreme Court upholds this contention, that these orders constituted in equity a partial assignment. But the court proceeding to the question as to whether such an assignment as this can be enforced in equity, even against the maker, holds that this Act of Congress renders all claims against the government inalienable alike in law and equity, for every purpose and between all parties.

The same claim was apparently made in this case that the appellants are now making in the case at bar, viz: that this act was intended for the protection of the government and did not invalidate assignments between the parties thereto. The remarks of the court in disposing of this contention show very clearly the protection which the enforcement of this statute gives to the government, and the language applies equally well to the case at bar as it did in the Spofford case.

The court say:

"What the frauds were against which it was intended to set up a guard, and how them might be perpetrated, nothing in the statute informs us. We can only infer from its provisions what the frauds and

mischiefs had been, or were apprehended, which led to its enactment. One, probably, was the possible presentation of a single claim by more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice, or rendering necessary the investigation of the validity of an alleged assignment. Another and greater danger was the possible combination of interests and influences in the prosecution of claims which might have no real foundation, of which the facts of the present case afford an illustration. Within our knowledge there have been claims against the government, interests in which have been assigned to numerous persons, and thus an influence in support of the claims has been brought into being which would not have existed had assignments been impossible. We do not say that the passage of the act was induced by these considerations. It is enough that frauds or wrongs upon the treasury were possible in either of these ways, and it may be that Congress intended to close the door against both. However that may be, the language of the act is too sweeping and positive to justify us in giving it a limited construction. We cannot say, when the statute declares all transfers and assignments of the whole of a claim or any part or interest therein, and all orders, powers of attor-

ney or other authority for receiving payment of the claim or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between parties thereto, and only invalid when set up against the government."

Appellants' counsel in commenting upon this case intimates that it involved the assignment of a part of a disputed claim then in controversy, but the facts show that Spofford became the owner of this claim after the written assurance that Kirk had been allowed by the government something over $9,000.00, in other words; Spofford's assignment was taken after the allowance of the claim. In the case at bar these assignments were taken before the allowance of the claims, or ascertainment of the amounts which might be paid upon them, and there is nothing in the record to show that no dispute had arisen or was likely to arise between the government and Gamwell and Wheeler upon account of the fulfillment of the contracts, upon which these claims were based.

The reference of the counsel to an opinion of the Supreme Court wherein the language of Spofford vs. Kirk is referred to as "strong language," is found in the case of Goodman vs. Niblack 102 U. S.

556 (decided January 10th, 1881), to which case we will later refer—and yet the Supreme Court in the case of Ball vs. Halsell 161 U. S. 72 (decided March 2nd, 1896), in speaking of the decision in the Spofford case expressly states that it has never been overruled or questioned by that court, and in the case of Nutt vs. Knut, 200 U. S. 12 (decided in 1906), cites this case as the first authirity that an assignment similar to the one in the case at bar was void.

In the case of Ball vs. Halsell 161 U. S. 72 (decided March 2nd, 1896), an action was brought by Ball to recover on a contract entered into between him and defendant's decedent, by which Ball was appointed attorney in fact to prosecute a claim against the government upon account of Indian depredations, and Ball was to receive one-half of all such moneys for his services. This was a case between the parties to a contract respecting the payment of a claim by the United States which the government had paid and had no further interest in the matter.

After quoting this section 3477, the court holds that this contract is forbidden by the statute, and after speaking of the case of Spofford vs. Kirk, says:

"That decisioin has never been overruled or questioned by the court, although the act has been

held not to apply to general assignments, made by a debtor of all his property for the benefit of his creditors, whether under a bankrupt or insolvent law or otherwise."

Freedmans Savings & Trust Co. vs. Shepherd, 127 U. S. 494 (decided April 30th 1888), is urged most strongly by respondents in support of their position. The only danger we apprehend from the case is in the complicated statement of facts involved in it, not in the rule of law announced. Here the Freedmans Savings & Trust Company sold and conveyed certain real property to one Bradley, or Shepherd, for whom the former was really acting, and the latter gave back a purchase money mortgage, but before giving this mortgage he had leased the premises to the United States Government for postoffice purposes, reserving an annual rent. Thereafter Shepherd assigned the rentals from this postoffice lease to his creditor, William Thompson. The government failing to pay the rent, it was put in judgment, and eventually drafts issued by the government therefor. The Freedmans Savings & Trust Company contended that it was entitled to these drafts as being carried by the mortgage of the premises, rents, issues and profits thereof. Thompson contended that these were not carried by the mortgage,

but by the assignment from Shepherd to himself. The greater part of the court's consideration and discussion of the case is given to determining the rights under the mortgage of the Trust Company, resulting in the view that the Trust Company as mortgagee was not entitled to any accruing or accrued rents until it had taken possession of the premises on default sale and foreclosure of its mortgage, which did not involve the particular rents covered by the government's warrants. The Trust Company contended that the assignments of the rents to Thompson was in violation of sections 3477 and 3777 R. S.

It is true that the court holds, in discussing this feature of the case, that the assignment was not against the statute, but it is for the reason that the facts did not bring the case within the statute, but at the same time they say, "undoubtedly the lease made by Bradley to the United States created in his favor what in some sense was a 'claim upon the United States for each year's rent as it fell due. And if the statute embraces a claim of such character, there could not have been any valid transfer or assignment of it in advance of its allowance, which could have been made the basis of a suit by the assignee against the United States, or which would compel the government to recognize the transfer or

assignment. It is, perhaps, also true that, under some circumstances, the assignor, before the allowance of the claim and the issuing of the warrant may disregard such an assignment altogether."

In this case the government, through its proper officers, had recognized the transfer of the property and an assignment of the lease and an assignment of the rent under it, and had paid the rent and had issued its warrant for the payment of rent in accordance with this assignment. But this discussion we take it, is wholly wide of the mark, because the court had already decided that the Trust Company had no rights itself to the rents under its mortgage, and there was no one else contesting Thompson's rights.

In both of the cases of Ball vs. Halsell (decided in 1896) and in the case of Nutt vs. Knut (decided in 1906) this case of Freedmans Savings & Trust Co. vs. Shepherd was cited to the court in support of just such a contention as the appellants are making here, and in each instance the decision was adverse to their claim.

In the case of Nutt vs. Knut (200 U. S. 12), the defendants made a contract with one James W. Denver, whereby Denver was to prosecute a claim against the United States government and was to receive one-third of the amount realized, which pay-

ment was "made a lien upon said claim and upon any draft, money or evidence of indebtedness which may be issued thereon." The attorney was successful in his efforts, and sums amounting to $125,000.00 were appropriated by Congress in payment of the claims. Of all of these payments except the last, the attorney, Denver, who was the testator of the plaintiff, Nutt, had received payment of his share under the contract, but the last was refused him. He sued for this in the State Court of Mississippi and prevailed on appeal to the Supreme Court of that state. But on appeal from the State Court to the Supreme Court of the United States, the latter court refused him a lien upon the fund in question upon the ground that it considered the assignment was in contravention of Section 3477. The case, we take it, is all the stronger in view of the fact that the Supreme Court of a state was reversed, and in view of the fact that the Supreme Court found that the suit was not for lobbying services but in effect in good faith; and any court under such circumstances, would have gone far to have seen that a client should pay the proportion that he had agreed to pay his attorney of money which he had in his pocket at that time through the skill and services of such attorney had it not been prevented by the statutes.

In this case the court in passing upon the merits of the case as affected by the section 3477, on pages 20 and 21, say:

"That section, as we have seen, declares null and void, all transfers and assignments of a claim upon the United States, or of any part or share thereof, or any interest therein, whether absolute or conditional, and whatever may be the consideration thereof, and all powers of attorney, orders, or other auhorities for receiving payment of any such claim, or of any part or share thereof, unless they are freely made and executed after an allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. This statute has been the subject of examination in many cases. (Here follows citations to all the cases in the Supreme Court referred to in this brief or in the brief of appellants). If regard be had to the words as well as to the meaning of the statute, as declared in former cases, it would seem clear that the contract in question was, in some important particulars null and void upon its face. We have in mind that clause making the payment of the attorney's compensation a lien upon the claim asserted against the government, and upon any draft, money, or evidence of indebtedness issued thereon. In giving that lien

from the outset before the allowance of the claim and before the allowance of the claim and before any services had been rendered by the attorney, the contract in effect, gave him an interest or share in the claim itself and in any evidence of indebtedness issued by the government on account of it. In effect or by its operation it transferred or assigned to the attorney, in advance of the allowance of the claim such interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid anyone who was a stranger to the original transaction to come between the claimant and the government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of business on the part of the officers of the government. We are of the opinion that the state court erred in holding the contract, on its face, to be consistent with the statute."

Counsel for appellant intimate in their brief that the assignments in the cases of Ball vs. Halsell and Nutt vs. Knut were void because the contracts in themselves were champertous but in the Nutt vs. Knut case the contract is expressly upheld, even though the point was made and argued in that court

by the defendants that the contract was void as being against public policy.

This case (Nutt vs. Knut) was decided by the Supreme Court of the United States January 2nd, 1906; and it is the last time we are able to find that the question has been before that court. It is idle therefore, we take it, for appellants to attempt to overrule this case by the case of Conde vs. York, 147 N. Y. 486, which was decided by the state court ten years before. In fact it appears that the Conde case was cited in the brief to the Supreme Court of the United States in Nutt vs. Knut and doubtless was fully considered and reviewed by that tribunal. This case was taken to the Supreme Court of the United States upon a writ of error and is reported in 168 U. S. 642. In speaking of the facts in this case the court say:

"The United States had, in due course, paid over the money to the contractors and between them there was no dispute; nor had the United States any concern in the question as to which of the rival claimants was entitled to the fund, the proper distribution of which depended on the equities between them. What the New York courts determined was that the equities of York and Starkweather were superior to those of Conde and Streeter, and judgment went accordingly."

The court further holds that the construction of this statute was not necessarily involved in the decision of that case and dismissed the suit for lack of jurisdiction.

In the case of Henningsen vs. U. S. Fidelity & G. Co., 143 Fed. 812, here Henningsen, a government contractor, gave bond to the Federal Government with the U. S. F. & G. Co. as surety, for the faithful performance of his contract, and the payment of material, men and labor; and he, Henningsen, also assigned to Spencer, a banker, his claim against the government as security for advances then made by Spencer. The controversy here was between Spencer, who based his claim both upon his written assignment, and upon an equitable subrogation on the one part, and the Surety Company, which claimed a right of subrogation to the moneys in the hands of the Government to indemnify it for payments made to material men and laborers on default of its principal. The Circuit Court of Appeals held the assignment of Spencer invalid under sections 3477, and 3777, and the case proceeded only upon the other ground.

The rulings of the Supreme Court in the cases of Goodman vs. Niblack, 102 U. S. 556 (decided January 10th 1881), Erwin vs. United States 97 U. S.

392 and Price vs. Forrest, 173 U. S. 410, are not in any way inconsistent with the holdings of the Supreme Court in the cases we have heretofore cited. The effect of these cases is to simply hold that an involuntary transfer by operation of law to the creditors of a claimant will transfer the claim against the government.

The cases of Goodman vs. Niblack 102 U. S. 556 and Erwin vs. United States, 97 U. S. 392, merely hold that this section does not apply to a voluntary assignment of a claim against the United States, which is included in an assignment made by the insolvent debtor of all his effects for the benefit of his creditors; and in the Niblack case, the assignment of the claim was long before the completion of performance of the mail contract, and the government had recognized it by permitting the trustees to perform the contract and receive pay under it for years, and further than that Congress had by a special act recognized the validity of the assignment.

The case of Price vs. Forrest, 173 U. S. 410, holds that an order of the state court appointing a receiver of a claim against the government and ordering the claimant to assign the same to such receiver to be held subject to the order of the court for

the benefit of those entitled thereto, is not prohibited by this statute but placed it upon the express ground that it is an assignment by operation of law, such as was upheld in the case of Erwin vs. United States and Goodman vs. Niblack, and reconciles its ruling in this case with the case of Ball vs. Halsell and the case of St. Paul & Duluth Railroad Company vs. United States, 112 U. S. 733, by stating that the assignments were held to be void in these latter cases, because they were voluntary assignments.

The rulings of the Supreme Court in the cases of Goodman vs. Niblack, Erwin vs. United States and Price vs. Forrest are all consistent in holding that the transfer of a claim against the government by operation of law is not within the prohibition of the statute and these cases are authority for appellee's contention that an assignment by virtue of the bankrupt law vests in the trustee the title to these claims, free of any lien thereon by virtue of the appellants' assignments.

The case of St. Paul & Duluth Railway Company vs. United States, 112 U. S. 733, (decided January 5th, 1885), also recognizes the distinction which is made in the cases of Erwin vs. United States, Goodman vs. Niblack and Price vs. Forrest. The facts in this case were as follows: The plaintiff Company

bought in at mortgage foreclosure all of the property of the Lake Superior & Mississippi Railroad Company. The latter company had a contract with the United States government for the carrying of mails between St. Paul and Duluth, for which it had an unpaid claim. The plaintiff claimed this amount due for carrying mails as belonging to it under the mortgage foreclosure and sale. The court held that this claim of plaintiff could not be sustained as being in plain contravention of Section 3477, reviewing both the Erwin and the Goodman cases, but distinguishing the present case therefrom as being "A voluntary transfer by way of mortgage for the security of a debt and finally completed and made absolute by judicial sale. If the statute does not apply to such cases it will be difficult to draw a line of exclusion which leaves any place for the operation of a prohibition."

We fail to see how the case of Bailey vs. United States, 109 U. S. 432 strengthens the position of the appellants. In this case Bailey sought to recover from the United States a claim which had been previously paid to the government under power of attorney executed by him and unrevoked at the time of the payment. In passing upon the question, the court say:

"In the case before us no question arises as to the transfer or assignment of a claim against the government. The question is whether payment to one who has been authorized to receive it by the power of attorney executed before the allowance of the claim by the act of Congress was good as between the govenment and the claimant, where, at the time of payment such power of attorney was unrevoked. If, in respect to transfers or assignments of claims, the purpose of the statute as ruled in Goodman vs. Niblack, was to protect the government, not the claimant in his dealings with the government, it is difficult to perceive upon what ground it could be held that the statutory inhibition upon powers of attorney in advance of the allowance of the claim and in the issuing of the warrant, can be used to compel a second payment after the amount thereof has been paid to the person authorized by the claimant to receive it. A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted— may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact."

Nor is the case of Hobbs vs. McLean, 117 U. S. 567 at variance with the rulings of the Supreme Court as we contend them to be. Here Peck made a

bid for the supplying of the army of the United States a certain amount of wood and hay, and believing that the contract would be awarded to him, entered into partnership with McLean and Harmon for the purpose of carrying out the contract with the United States which it expected to make. The contract was afterwards awarded to Peck. McLean and Harmon did all the work that was done and advanced all the money that was expended in performing the contract, except about $100, which was furnished by Peck. The partners delivered the wood and received some payment on account, but being dissatisfied with the amount, Peck, "who was the only person to whom the government was bound, filed on November 7th, 1877 his petition in the Court of Claims against the United States, demanding $55,000 damages for breach of contract." During the pendency of this suit, Peck became a voluntary bankrupt, and Hobbs was appointed his assignee. Hobbs was thereupon substituted for Peck in the suit against the United States, and finally recovered judgment, upon which the money was paid over to him, Hobbs. McLean and Harmon then brought suit in equity to enjoin Hobbs as assignee from distributing the proceeds of this judgment to the creditors generally, but claimed the fund, not because

of any assignment from Peck, but because they as partners had paid out all the money and done all the work under the contract, and therefore claimed that the proceeds of this should go to them as assets of the partnership before going to the individual creditors of Peck. It is true that Peck had given written orders by which he agreed to pay to Harmon and McLean certain sums out of the moneys he might thereafter receive on account of his claim against the United States for contract of wood. The court, however, held that these gave Harmon and McLean no new right for they were already entitled to these amounts under their partnership articles, and that "Peck was therefore only promising to do what, on a good consideration, he had already by the articles of partnership promised to do. There was no new consideration for these new promises." Upon a careful analysis of this case, therefore, it will be shown that the construction of this section 3477 was in no way involved in the determination of the suit, except, perhaps, insofar as to hold the rule laid down in the Erwin and Goodman cases, that the claims passed by bankruptcy from Peck to Hobbs, the assignee.

We believe that a review and analysis of the cases cited by the Supreme Court of the United

States, wherein the construction of this statute was involved, definitely establishes the rule that a voluntary assignment by a claimant of his claim against the United States, prior to its allowance, conveys no rights and creates no liens in favor of the assignee, and that the only exception to this rule is that recognized by the cases of Goodman vs. Niblack, Erwin vs. United States and Price vs. Forrest, heretofore reviewed: That an involuntary assignment by operation of law for the benefit of all of the creditors of the claimant will convey his right in the claim; and it is upon the princple announced in these cases that we assert that the trustee in bankruptcy here is the only person to whom this fund belongs, and that the assignments held by the bank create no lien thereon.

It is respectfully submitted that the decision of the District Court is in accordance with law and should be affirmed.

PETERS & POWELL and
COOLEY & HORAN,
Attorneys for Appellees.
KERR & McCORD,
Attys for R. E. Downie, Trustee.